

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Commercial Law Corporation, P.C.,

Plaintiff,

Case No. 10-13275

v.

Hon. Sean F. Cox

Federal Deposit Insurance Corporation,
as Receiver for Home Federal Savings
Bank,

Defendants.

**ORDER OVERRULING PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE
WHALEN'S SEPTEMBER 27, 2013 ORDER**

Plaintiff Commercial Law Corporation, P.C. ("Plaintiff") brought this action against Defendant Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Home Federal Saving Bank. Plaintiff seeks to recover attorney fees for services allegedly rendered as Home Federal Savings Bank's general counsel prior to the appointment of the FDIC as Receiver for the bank.

In an Order issued on September 17, 2012, this Court allowed the FDIC to issue a subpoena to Plaintiff's internet service provider in order to obtain e-mails sent to or received by Mr. Erwin and/or Plaintiff for the time period from October 6, 2009, through February 6, 2012. (Docket Entry No. 164). This Court further ordered that: 1) all e-mails produced in response to the subpoena "shall be submitted to the Court, before any review by Defense Counsel, so that the Court and/or Magistrate Judge Whalen can review the documents for privilege and relevance"; and 2) "Plaintiff's Counsel shall be provided a copy of all e-mails produced" in response to the

subpoena. (*Id.*).

On November 13, 2012, the Court and Plaintiff's Counsel received a disc containing approximately 600 e-mails that were produced in response to the subpoena.

Thereafter, in an order issued on November 16, 2012 (Docket Entry No. 171), this Court ordered as follows:

- 1) If Plaintiff objects to any of the e-mails being produced to Defendant on the basis of either relevance or privilege, then no later than **November 30, 2012**, Plaintiff shall file a brief identifying each e-mail by date, time, and title, and stating the nature of the objection to each e-mail;
- 2) If Plaintiff files a timely brief objecting to the production of e-mails to Defendant, then Magistrate Judge Steven Whalen shall conduct an *in camera* review of the e-mails produced and shall issue an order making a determination as to each e-mail objected to by Plaintiff; and
- 3) If Plaintiff does not file a brief by **November 30, 2012**, the Court shall Order that all e-mails produced in response to the subpoena be provided to Defendant.

IT IS SO ORDERED.

(Docket Entry No. 171 at 2).

On September 27, 2013, Magistrate Judge Whalen issued an "Order Following In Camera Review" (Docket Entry No. 183), wherein he ruled that Plaintiff's objections to 33 specifically enumerated emails "are overruled" and "Plaintiff shall, within 14 days of the date of this Order, produce to Defendant's counsel copies of all of the 33 above-enumerated emails. If a particular numbered email is comprised of an email chain, Plaintiff shall produce the entire email chain." (*Id.* at 3). Magistrate Judge Whalen sustained Plaintiff's objections to the remaining emails. (*Id.*). With respect to certain enumerated e-mails involving Home Federal Savings Bank that he ordered produced, Magistrate Judge Whalen overruled Plaintiff's objections on the basis of attorney-client privilege, concluding that once the FDIC was appointed as receiver to Home

Federal Savings Bank, it held the privilege. (*Id.* at 3).

This matter is now before this Court on Plaintiff's Objections¹ to Magistrate Judge Whalen's September 27, 2013 Order.

A district court judge may designate a magistrate judge to hear and determine pretrial matters pursuant to 28 U.S.C. §636(b)(1). When a magistrate judge hears and determines a non-dispositive motion (*i.e.*, one that is not enumerated in §636(b)(1)(A)), the district judge to whom the case is assigned may reconsider the order addressing that motion "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *Id.*; *see also* FED. R. CIV. P. 72.

In light of the age of this case, this Court has given expedited consideration to Plaintiff's objections. Having reviewed Plaintiff's objections to the September 27, 2013 Order, the Court finds them without merit.

In objecting to Magistrate Judge Whalen's order, Plaintiff asserts that the magistrate judge "improperly classified" Plaintiff's objections to the e-mails produced because he stated that Plaintiff objected to "every" e-mail at issue. Plaintiff asserts that he only objected to 597 of the 615 e-mails produced and therefore he did not object to "every" e-mail. The Court finds this objection "much ado about nothing," especially considering that the magistrate judge sustained Plaintiff's objections on the vast majority of e-mails produced.

The Court also finds Plaintiff's assertion that Magistrate Judge Whalen has a personal bias against Plaintiff and/or its counsel entirely without merit.

¹The FDIC has not filed any objections to the September 27, 2013 Order and time for doing so has passed.

Finally, Plaintiff objects to the magistrate judge having overruled Plaintiff's objections on the basis of attorney-client privilege, with respect to certain e-mails involving Federal Home Savings Bank. Plaintiff asserts that it "did not have the opportunity to present argument and proof that the attorney/client privilege may not belong to the Defendant has [sic] decided." (Pl.'s Objs. at 9). Plaintiff then directs the Court to *In re American Continental Corp.*, 741 F.Supp. 1368 (D. Ariz. 1990) and *Federal Deposit Ins. Corp. v. McAtee*, 124 F.R.D. 662 (D. Kan. 1988).

The Court finds this objection without merit because, considering the issue *de novo*, and having considered the authority that Plaintiff now relies on, the Court agrees with Magistrate Judge Whalen's ruling that once the FDIC was appointed as receiver of Federal Home Savings Bank, it held the privilege.

Accordingly, the Court **OVERRULES** Plaintiff's objections and **AFFIRMS** the September 27, 2013 Order.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: October 15, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 15, 2013, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager